

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
WOOD, : Docket #1:20-cv-02489-
 : LTS-GWG
 :
Plaintiff, :
 :
- against - :
 :
MIKE BLOOMBERG 2020, INC., : New York, New York
 : September 15, 2021
Defendant. :
----- :

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: OUTTEN & GOLDEN LLP
BY: HANNAH COLE-CHU, ESQ.
601 Massachusetts Avenue N.W.
Suite 200 West
Washington, D.C. 20001

OUTTEN & GOLDEN, LLP
BY: THEANNE LIU, ESQ.
MICHAEL DANNA, ESQ.
685 Third Avenue, 25th Floor
New York, New York 10017

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

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APPEARANCES - CONTINUED:

For Defendant:

PROSKAUER ROSE LLP
BY: ELISE BLOOM, ESQ.
ALLISON MARTIN, ESQ.
PINCHOS GOLDBERG, ESQ.
11 Times Square
New York, New York 10036

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: Good morning, this is the matter
3 of Wood versus Mike Bloomberg 2020, case number
4 20cv2489. Starting with plaintiff's counsel, please
5 state your appearance for the record.

6 MS. HANNAH COLE-CHU: Hannah Cole-Chu from Outten
7 & Golden representing the plaintiffs --

8 THE COURT: I'm sorry, I didn't hear the
9 beginning. Your name please, I'm sorry.

10 MS. HANNAH COLE-CHU: Good morning, Your
11 Honor, my name's Hannah Cole-Chu representing the
12 plaintiffs from Outten & Golden. With me is --

13 THE COURT: Can you give me the appearance
14 sheet? Thanks.

15 MS. COLE-CHU: -- Theanne Liu and Michael
16 Danna.

17 THE COURT: Okay.

18 MS. ALISE BLOOM: Good morning, Your Honor,
19 Alise Bloom from Proskauer Rose representing the
20 defendant Mike Bloomberg 2020, and I'm joined by my
21 colleagues Allison Martin, Noa Baddish, and Pinny
22 Goldberg.

23 THE COURT: Okay, welcome everyone. We're, of
24 course, here on the motion to amend. It's hard to know
25 where to begin with this. I guess maybe - well, let's

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start with the sea change that apparently occurred which is that the individual, whose name I now need to find, who everyone originally thought was not going to be part of this case is, in fact, going to - the person who filed the claim is going to be, remain as part of this case. Is that right? I guess this is a question for Ms. Cole-Chu.

MS. COLE-CHU: That's correct, Your Honor. The name is plaintiff Wheatley-Diaz.

THE COURT: Sorry? Wheatley-Diaz, that's right. Okay, so I guess, first of all - let's do this one plaintiff at a time. Let's just talk about Wheatley-Diaz for a while. I guess what I would've thought would be that if there was some problem with the claim proceeding at all, it somehow would've come up earlier. And the defendants, I guess they have no reason to since they didn't Wheatley-Diaz was going to be part of the case. But I'm trying to understand what the problem is with Wheatley-Diaz being part of the case. So maybe I should hear from the defendants on this, Ms. Bloom.

MS. BLOOM: Certainly, Your Honor. The problem as it stands today is that it's our position that Ms. Wheatley-Diaz is time-barred from pursuing her

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2 PAGA claim at this point. And I can walk the Court
3 through the chronology if that would be helpful.

4 THE COURT: Let me try it myself because it
5 might make it easier for me to understand it. There was
6 no PAGA claim originally obviously. Not sure why that
7 would be so, but I guess - I'm not going to worry about
8 that. So there's no question that the claim would have
9 been timely if filed a year and 65 years after whenever
10 that claim was filed with the California agency. Are
11 you with me so far?

12 MS. BLOOM: Yes, Your Honor.

13 THE COURT: Okay, and when did that date
14 expire from your point of view, putting aside tolling
15 and agreements and everything else?

16 MS. BLOOM: June 5 of 2020. And the one thing
17 I would point out that I think is important, well, is
18 significant with regard to that date is on May 18 of
19 2020 the plaintiffs had filed their second amended
20 complaint, and had they intended to pursue this claim
21 with Ms. Wheatley-Diaz, they simply could've waited
22 until June 5, just like 17 days later, and they could've
23 at that point or at some point, at that point they could
24 have filed the claim for Ms. Wheatley-Diaz. I'm sorry,
25 I may be confusing you. June 5 of 2020 is the first day

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that Wheatley-Diaz could've filed her PAGA claim.

THE COURT: That's the date I meant, and maybe we should stop using the word claim and start using cause of action and reserve claim for the thing that's given to the agency just to be clear.

MS. BLOOM: Okay. Sure.

THE COURT: So she could've filed a cause of action June 5, 2020, and, of course, should could've filed a cause of action later, but your position would be you could only go back to collect damages or alleged conduct for a year and 65 days prior to whatever date she filed, right, Ms. Bloom?

MS. BLOOM: Correct.

THE COURT: Okay. Now, let's assume for the moment that I reject your argument that California tolling order from the court somehow proffer that would add 178 days to the June 5 date, is that right?

MS. BLOOM: If you reject our argument that the California emergency rule applies here, then I believe she would be timely.

THE COURT: Ah. I don't need to deal with the tolling agreement in that case?

MS. BLOOM: Right, because the tolling - exactly.

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2 THE COURT: Because the tolling, because your
3 argument would take effect at that point.

4 MS. BLOOM: I'm sorry.

5 THE COURT: Because your argument, your own
6 stipulation would take us the rest of the way, is that
7 right, Ms. Bloom?

8 MS. BLOOM: I'm not sure I understand the
9 question, I'm sorry.

10 THE COURT: Well, I'm adding 178 days to June
11 5, and I'm quite certain it's not, doesn't take us to
12 2022. So I'm trying to understand why you think it's
13 okay if the 178 days is added.

14 MS. BLOOM: The reason why I think it's okay
15 is because we had the intervening tolling agreement and
16 from our perspective --

17 THE COURT: That's what I just said. I said
18 it's your agreement that allows, that takes us till
19 today.

20 MS. BLOOM: Okay, I'm sorry.

21 THE COURT: Okay, maybe I was unclear. Okay,
22 so your complaint about Wheatley-Diaz turns solely on
23 the validity of that order, the emergency rule, is that
24 right?

25 MS. BLOOM: As to whether her claim is timely,

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that is correct. I'm sorry, her cause of action.

THE COURT: So that's the only barrier to this case proceeding is whether that California rule is valid.

MS. BLOOM: As to her cause of action, correct.

THE COURT: Okay. Now let's assume that no one has supplied any case law on this topic, except for one case I think that now was pointed out by the plaintiffs, where some California court said, yep, that's the rule and we're following it. How am I supposed to say that's incorrect?

MS. BLOOM: Your Honor, I believe that we submitted several cases to you where federal courts - and I can give you the citations - held that that rule did not apply in federal court, that it was limited to state court.

THE COURT: If you did, I think I missed it. So tell me where they're cited.

(pause in proceeding)

MS. BLOOM: I'm going to give - there's four cases, Your Honor, and I'll give you the cites to the cases --

THE COURT: Why don't you give me the page of

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2 your brief where it's cited or letter, wherever it is.
3 Tell me the document.

4 MS. BLOOM: Okay, my fault, Your Honor, they
5 were not cited in our brief. There are just four cases
6 that we've become of aware of.

7 THE COURT: Okay, well, I don't know how you
8 think I'm supposed to adjudicate an issue that you don't
9 bring to my attention. So now you're - I mean you had a
10 chance, you know, this issue was raised by the plaintiff
11 and I thought, okay, what's the defendant going to say
12 about this, and you had nothing to say. You just said
13 we don't think it's constitutional without citing a
14 similar case. The other side pointed out you failed to
15 cite a case.

16 Well, I'm willing to hear one of the cases.
17 Give me your best one.

18 MS. BLOOM: Shuvan v. Universal Vacation Club,
19 and the cite is 2022 W.L. 3577247. It's from the
20 Central District of California from August 18 of 2022.
21 And I've got three others for you as well.

22 THE COURT: Well, let me just take one.
23 (pause in proceeding)

24 THE COURT: All right, you don't have this
25 case. You're probably at a disadvantage here.

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MS. COLE-CHU: Plaintiffs are not aware of the case.

THE COURT: I'm always saying we should just adjourn this proceeding.

(pause in proceeding)

THE COURT: All right, well, I certainly am not going to decide this adversely to the plaintiffs without them having a chance to brief it since it was just sprung on them. But what this case appears to be suggesting is that the rule applies in California courts and that there's some dispute about whether it applies elsewhere. I don't know if there's adverse case law. So I don't know what to do at this point. If there's a way for you to make the argument, and I'm talking to the plaintiff, in the absence of that tolling provision as to Wheatley-Diaz, I'm happy to hear it. Do you have a - is there an argument on that point or do you need the tolling provision?

MS. COLE-CHU: Yes, Your Honor.

THE COURT: Okay, so let's see, if you win on that anyway, I won't have to worry about this. Go ahead.

MS. COLE-CHU: Yes, thank you, Your Honor, good morning. The plaintiffs agree that the dispute

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between the parties hinges on this timeliness question. You know, as we set out in our briefing, our position is that the California, the emergency tolling issue by the California court system is valid and applies here. And under that tolling and the private tolling agreement between the parties, all three plaintiffs have timely filed their PAGA notices or timely bringing their claims in this lawsuit. You know, I think it's important to note that the standard here and the element that we're discussing under the standard is futility, and the standard is whether the party moving to amend has no chance of succeeding in opposing a motion to dismiss.

And, you know, we have not had the opportunity to review this case or look for contrary authority, but, you know, even recognizing that some authority out there like the authority that my opposing counsel is citing exists, we still contend that the amendment is not futile.

First, because it is clear that this is an open question whether the, you know, the applicability of the, and the validity of the emergency rule issued by the California court system, you know, as you noted, and we cited in our brief there is no case law invalidating the rule. And even if there is some question regarding

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the validity of the rule or the (indiscernible) is correct that it is invalid, the claim should still proceed. Plaintiffs would be entitled to equitable tolling --

THE COURT: Okay, so I'm just trying to hone in on this question. So if you don't have the emergency rule, do you have to rely on equitable tolling?

MS. COLE-CHU: That's correct, we would, yeah, plaintiffs would be entitled to equitable tolling --

THE COURT: See, I don't think that's (inaudible) either. I mean we have elements, I mean it was mentioned, but there are elements of equitable tolling that are described in, you know, federal case law. I assume it's a federal law has to govern this. Would you agree? Equitable tolling?

MS. COLE-CHU: Correct, yes.

THE COURT: Okay, so - did you think you've briefed equitable tolling and, if so, where?

MS. COLE-CHU: We did not brief equitable tolling. It's not a claim that needs to be pled, and our position - we're focusing on the futility inquiry and our position is that the claim should proceed so the parties have an opportunity to obtain discovery on the equitable tolling relief.

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THE COURT: Oh, well, that's unusual. Usually plaintiffs give me the reasons why they're equitably tolling at this stage.

MS. COLE-CHU: We can. We can submit briefing on that, and I can, we can discuss it now as well.

THE COURT: Well, I'm not sure any point with all these things hanging out unbriefed to start trying to do this all orally. Okay, so you need equitable tolling if you don't win on - okay, I mean this has to be briefed. I don't know what else we can do. I don't know. It is what it is. So I mean briefing on the California emergency rule and on equitable tolling, and we'll talk about how to do that.

Now, I guess maybe we should talk about the other two plaintiffs, Ceppos and the other one. You will think, you know, I have all this briefing about them, none of which - I guess - don't they also have to overcome, they have to overcome the 178 hurdle and equitable tolling too, do they not? Let me get the defendant's view. Do they have the exact same problem? I'm not saying the only problem, but do they at a minimum have those two problems?

MS. BLOOM: At a minimum they have those two problems, yes.

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THE COURT: Right. So I mean it seems like the equitable tolling should've been briefed as to those two in our first round. I'm not sure why that hasn't happened. At 178, I mean that's the plaintiff's fault, 178 is the defendant's fault, so I could say everyone bears some fault here. Okay, so now I'm wondering if it's even worth going over the additional problems that Ceppos have. Is there any reason why I should be torturing myself with that? Because if Wheatley-Diaz is in - I guess you want to be able to assert that they, I mean do you need to plead - they're already plaintiffs in the case, are they not?

MS. COLE-CHU: That's correct, Your Honor.

THE COURT: Yeah --

MS. COLE-CHU: Pardon me, I believe Nick Kocher (phonetic) is not already a named plaintiff. He is an opt-in.

THE COURT: Okay, but can't I put off - let's assume, and I'm not saying this is going to happen, but in the even that I found that Wheatley-Diaz was timely, why do I need to decide the Ceppos problem? From the defendant's point of view, let me ask them first.

MS. BLOOM: I don't think you do.

THE COURT: Yeah, they can sit - you don't

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care if they're plaintiffs I suppose. I mean they don't want to be time-barred, but let's say something God forbid happened to Wheatley-Diaz, they're going to want to bring in Ceppos and Colon.

MS. BLOOM: It would be our position that they were not able to do that.

THE COURT: Right, but I don't want to decide that now unless something happened to Wheatley-Diaz. So can't they sit as plaintiffs in the complaint without, just the way, just as plaintiffs without - maybe they can't. Is there some way for me to put this off without them being in a time-barred problem that I created? Do you see my problem?

MS. BLOOM: I think there are plaintiffs for other causes of action. I think the whole issue here is whether or not they could be substituted - because the plaintiffs need a plaintiff, a timely plaintiff who's met all the prerequisites for purposes of their PAGA claim. And my understanding is that when they first decided to assert the PAGA claim, they were going to use Wheatley-Diaz and then something changed, I'm not privy to that information, and she didn't want to be the PAGA person. And that was sort of how we ended up with the question about whether the other two potentially had

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timely claims which we don't believe that they do. But I think once we got to the place where the plaintiffs realized that if Wheatley-Diaz was time-barred, that these other two people might have timeliness questions. That was when I think it was last week or last Thursday or Friday they said but, wait, Wheatley-Diaz changed her mind, and now she'll come back in as PAGA.

So you don't need, you only need one person who satisfies all the requirements.

THE COURT: But here's my issue. If I'm plaintiff, I want the other two in if they're valid in case something happens to Wheatley-Diaz. And in order for that to happen, I have to go through the thing that actually was briefed and figure out whether they could serve that role. It seems to me not a good use of resources for me to do that unless the issue then comes up, and I think you kind of agreed with that. But I just want to make sure that we do it with a mechanism that you would be unable to come back later if something happened to Wheatley-Diaz and say not only does Ceppos have the problems I addressed here, but there's been this delay from now until whenever they get proposed to replace Wheatley-Diaz that's causing some additional problem. Do you see my issue?

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2 MS. BLOOM: I do. If we take things as they
3 sit today or when the Court, whenever the Court reaches
4 a decision as to Wheatley-Diaz, what I think you're
5 asking me is whether, suppose something happened to
6 Wheatley-Diaz, whether we would stand on the record that
7 we currently have with regard to the two other people on
8 timeliness, on assignability of the claim - because I
9 want to be clear, we have that assignability argument,
10 and that would not go away.

11 THE COURT: All your arguments, yeah.

12 MS. BLOOM: Yeah, so we would stand on the
13 record as it exists as of the time of your decision as
14 to Wheatley-Diaz.

15 THE COURT: Okay.

16 MS. BLOOM: Yes, I believe that's --

17 THE COURT: Is there anything about the
18 phrasing of the complaint, the proposed complaint that
19 sort of announces them as representatives or not? I
20 forget.

21 MS. COLE-CHU: Yes, Your Honor, they are named
22 as PAGA representatives and California class
23 representatives in the proposed third amended complaint.

24 THE COURT: Okay, well, I could issue, I could
25 say, again, if plaintiffs win on Wheatley-Diaz, I could

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say they can file the complaint, it's without prejudice to an argument that the defendants could make that they can't serve as representatives in the future should that become an issue. I think that's maybe the simple way for me to deal with it.

Okay, so I mean I had prepared until I got those letters yesterday to try to deal with all these issues, and I'm lifting up the briefs as I do it, relating to Ceppos and the other person, but that's not where we are. So let's think about how to brief this. I think it's your, I mean it's your burden on equitable tolling, so you certainly should go first as to whatever claims you're making on equitable tolling. If you have to put in - let me think about this. Yeah, you haven't exactly pled equitable tolling. I'm not sure you're required to plead it. I'm just thinking about this procedurally.

Do you need to go outside the record on equitable tolling? In other words, do you need to file affidavits or are you going to rely on, you know, the record as it exists and pleadings and so forth or don't you know?

MS. COLE-CHU: I'm not sure I can say with certainty at this point, but it's possible we may not

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2 need to go outside the record.

3 THE COURT: Okay. You think I'd know this by
4 now, but I'm trying to think about what I've done in the
5 past when a complaint is potentially untimely, there's a
6 motion to amend, and the plaintiff, you know, wants to
7 take advantage of equitable tolling. I feel like they
8 have made the allegations in the complaint about
9 equitable tolling. You know, they're not being tested
10 factually. The allegations are enough. And then, of
11 course, the defendant is free to move to dismiss on
12 statute of limitations ground later on. But I don't
13 think, you know, if there were some factual dispute
14 about equitable tolling, it would be decided on the
15 motion to amend.

16 You know, it's easiest enough if you're
17 relying, if all you're relying on is, you know, some
18 facts in the record that already exist as part of the
19 pleadings. But if you need to have additional facts,
20 then it seems to me they should be part of the proposed
21 amended complaint that show that it's not time-barred.
22 First of all, I'm using a little bit - do people
23 understand what I'm talking about and do they have an
24 answer? First from the plaintiff.

25 MS. COLE-CHU: I just - (pause) - I think

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that, so first I'd like to note, Your Honor, that plaintiff Ceppos and Kochers (phonetic) claims causes of action also rise and fall on emergency order as well. And I do believe that the resolution of they're, whether they're appropriate party representatives or not, which they are, also can be resolved through --

THE COURT: Defendants don't think that which is why I have all these briefs. That's not enough for them. They have other problems. They have this late claim problem, they have all kinds of other problems. I'm putting all that off. Right now, and I've told you how I'm putting it off. I'm going to say, you know, if Wheatley-Diaz were good, I'm going to say we're going forward with Wheatley-Diaz. If there's ever a problem in the future, that could be raised in the future, you know, based upon the current record. That's not my question. Put them out of your mind. I'm just talking about Wheatley-Diaz because you have told me that you need equitable tolling in the event you lose on the emergency rule issue. Right?

MS. COLE-CHU: Correct.

THE COURT: So what I've been musing about is what would happen if you needed to actually allege facts outside the record on equitable tolling. If you have to

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do that in the amended complaint, you're supposed to do affidavits. That's what I've been thinking about. If you have a view on it, fine; if you don't, I've already said I'm going to ask both sides.

MS. COLE-CHU: Yes, Your Honor, I - in our view equitable tolling is not something that needs to be put in the complaint. It's in response to the defense of timeliness or statute of limitations. And so this is why we are, our position is that the claims should proceed and the parties should be able to take discovery on the issue of equitable tolling.

THE COURT: Okay, so your view is even if they win on, I mean your view is that you can't oppose a motion to amend on statute of limitations grounds if the plaintiff says equitable tolling without explaining what it is or how it works or why it applies. The complaint has to be filed, and then equitable tolling has to be dealt with on a separate motion to dismiss, is that what you're saying?

MS. COLE-CHU: Well, our position is that we should be entitled to gather discovery on the equitable tolling question.

THE COURT: It's very unusual for a plaintiff who's asserting equitable tolling to need discovery on

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it. Maybe the defendant might need discovery on it; I'm not quite sure why you would need discovery on it. Why would you need discovery on it? Isn't the knowledge all within your ken?

MS. COLE-CHU: Yes, I think, as I stated, it's very possible that we would be able to do all of this on the record, but based on our experience this is not something that needs to be put in the complaint; it's something, it's an issue that's dealt with --

THE COURT: No, I'll accept it does need to be put in the complaint because in your view it's not time-barred based upon the emergency rule. So I guess I understand that. But we're still back to my issue which is how does it get raised or should get raised. Anyway, Ms. Bloom, do you have some view on this?

MS. BLOOM: I'm not sure that it would be - I'm not sure it would get raised here, but I would've thought that they needed to plead it in the complaint. I'm not sure why I'm saying that, but I would've thought - because the complaints that I have seen --

THE COURT: I would've thought it too if the complaint facially showed a lack of timeliness, but in their view it doesn't because they're viewing this emergency rule as saving them.

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MS. BLOOM: Okay, I, yes, I understand that point, and I think what I'm struggling with is that there's been so much back and forth in this case about Ms. Wheatley-Diaz, she was in, she was out, she wouldn't give discovery because she was going to be out, then she would only give very limited discovery. So when it came time to file the third amended complaint, I mean they certainly, I mean maybe - I can't speak for them, but I would've thought that they would've at least been concerned that potentially there was a timeliness issue and that if there were circumstances to justify equitable tolling, that those would have appeared in the third amended complaint.

THE COURT: Okay, I mean that's a very case specific argument. I guess I'm thinking about the problem more generally. I'm not sure that whatever the rule is I don't think it's going to vary from case to case based upon who was cooperative during discovery. So let's put that out of the picture. Do you have some view generically about how such a claim gets raised by a plaintiff who's otherwise, who's merely responding to an argument from the defendant about the timeliness that in their view doesn't apply even without equitable tolling?

MS. BLOOM: I actually really don't because I

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have never been in a situation before where it hasn't appeared in the complaint other than, and I really need to go back and look at the decision, I think very recently there is a situation where the plaintiffs attempted to raise equitable tolling in response to a motion to dismiss, and I believe that was rejected, but I don't want to speak out of turn. So --

THE COURT: Motion to dismiss.

MS. BLOOM: Yeah.

THE COURT: Right. Well, this is now - it may be that that's where this should be raised, in which case maybe the rule is, and certainly it would make my life simpler, is to say, you know what, the complaint is facially valid. I think that's really true now that I'm thinking about it. I think there's a limit to what you're supposed to do on a motion to amend. I think some of this has to be reserved to a motion to dismiss on statute of limitations grounds. I think you have to attack the face of the complaint. So let's think about this.

The problem is if you win on the California rule, in a sense you have attacked the face of the complaint. This is an interesting issue. I supposed you could throw something in the briefs about it, about,

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you know, if they try to go outside the record, you know, about how we're going to deal with that. I mean it's going to get raised one way or another, and it almost doesn't matter. It's just a question of whether this complaint gets filed, and then you get to attack it on statute of limitations grounds, and they'll raise equitable tolling as part of some motion to dismiss as opposed to being raised upfront on a motion to amend.

You know, there is some case law suggesting that futility, whether deny on grounds of futility, is a matter of discretion anyway. And then I kind of do have the authority to say just file this complaint and then make all these arguments as part of the motion to dismiss, and I may end up doing that. It just might be procedurally cleaner. But I guess at a minimum I'd want briefing on this emergency rule.

I don't know. I mean is there really any - it just seems cleaner if the complaint is filed and then you're free to attack it on a motion to dismiss. Do you really care as long as the grant of the motion to amend is without prejudice to any motion to dismiss you want to make?

MS. BLOOM: Well, I do care because I do think that they're time-barred, and I'm also - and there's two

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other pieces of the amended complaint that regardless of what we do on this --

THE COURT: That I'm willing to rule on.

MS. BLOOM: Okay, thank you. But with regard to the --

THE COURT: Well, thank me but you're not going to like the ruling.

MS. BLOOM: With regard to --

THE COURT: Let's assume those are out of the picture.

MS. BLOOM: Yes, it is from our perspective the Court should still deny the motion to amend on the grounds of futility because at the very least like my client has expended time and resources based on the representation that Ms. Wheatley-Diaz was not going to be proceeding as a PAGA plaintiff.

THE COURT: Okay, that's, of course, a completely different issue, and I understand your client would not be happy that they've briefed something that turned out, a number of issues that turned out to be not relevant given that she's ready to come back in. I know you want to be compensated for that. I notice you didn't cite a single case for it. I'm not sure what the authority would be for that without a finding of bad

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faith which I certainly don't have a record for at this point. So I don't think you have a 1927 claim. I'm not sure you get your fees for that. Do you have any ideas?

MS. BLOOM: I think it - I would think it could fall under the ambit of 1927 and based on where we started and the fact that last Thursday they resurrected, they said they were ready to her come back in without even an explanation as to why she wasn't in the first time and now she's willing to come back in.

THE COURT: Okay. Well, I mean you're obviously free at some point to make a 1927 application. Just recognize the Second Circuit has said there has to be intentional conduct amounting to bad faith, not someone changing their mind, if that's what happened.

Okay, so I hear your answer which is you rather have it decided on the motion to amend. I still haven't quite heard the prejudice because whatever prejudice has happened has already happened. It's not going to be affected by the procedural vehicle by which the statute of limitations argument is raised. And, in fact, it might be more effective to have it raised by the vehicle that it's traditionally raised which is a motion to dismiss which allows, you know, submission of affidavits if that's what the plaintiff intends to do. Kind of a

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fuller consideration. But I certainly understand you're not agreeing to this, so that answers my question.

All right, I will - let me just - give me a moment here. I'm just going to think about what I want to do in the very short term. So can you pause the recording. Folks, you can remain seated while I --

(pause in proceeding)

THE COURT: Okay, so I was researching the issue of what happens when equitable tolling gets raised on a motion to amend, and as with everything else, I think there's a lot of discretion here. Though case law does say, "Arguments over the statute of limitations, especially if they involve the defense of equitable tolling, are better addressed at a later stage of the case as a court would only deny a motion to amend if it is clear on the face of the pleadings that the claims would be barred by the statute of limitations and if the issue would not need to be more fully briefed." Hybrid Athletics LLC, sorry, the cite is Tatum v. Perelmutter, 2021 W.L. 165088. It's a District of Connecticut case at 2021. There's also plenty of case law that says a statute of limitations is an affirmative defense and that plaintiff is not required to allege facts of the complaint to overcome the affirmative defense.

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To the extent that there were any facts being offered beyond the pleadings of the complaint, it seems like it would be a lot more efficient not only to deal with this later but maybe even summary judgment if there were a factual dispute.

I gather that these claims under - tell me if I'm wrong - the claims under the California law, the PAGA law, are another way of getting damages that are otherwise available under the FLSA or am I wrong on that?

MS. COLE-CHU: Under California state law, under violations of the California labor code, Your Honor, yes. And in this way there's no additional discovery, there's no additional burden imposed on defendants in pleading the claims and letting them in. And this is an issue of California law, Your Honor. And by the time the parties deal with it as summary judgment, we may have more authority on the issue.

THE COURT: Okay, so the answer to my question is the factual basis overlaps with existing claims, is that correct?

MS. COLE-CHU: That's correct.

THE COURT: Okay, that was my issue. Okay, give me a second. Anything - I'm sorry - anything from

1 the defendant on this?

2 MS. BLOOM: No, Your Honor.

3 THE COURT: I mean, you know, we now have a
4 new amended complaint in front of us than the one that
5 was part of the motion, Ms. Bloom. So I don't want to
6 act precipitously. I mean let me tell you what I'm
7 about to do, and if you want a chance to talk me out of
8 it in briefing, I suppose you could do that. I just
9 think since you are probably concerned with the costs to
10 your defendant, to your client, it might be the better
11 course to not require that additional briefing. But
12 what I'm going to do is rule on the other two issues you
13 raised, which I don't need any argument on. The other
14 being common law claims which were dismissed and a
15 request to designate new class representatives. But as
16 to the PAGA claim, I'm going to exercise my discretion
17 to, because the only issue is statute of limitations, to
18 not address the futility issue since it is raising
19 issues that are better addressed at a later stage such
20 as in a motion to dismiss or at summary judgment stage,
21 obviously without prejudice to any arguments the
22 defendants wish to make as to the liability of that
23 claim.

24 So, Ms. Bloom, do you want a chance for further
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briefing because - and the reason I'm doing that is because you were only two days ago presented with a new complaint, the final version of the new complaint.

MS. BLOOM: Your Honor, I've looked at the new complaint, and I don't - I think the issues that it presents are the same issues that are currently before the Court. So I don't think that additional briefing is going to be - I would not ask for additional briefing on the motion for leave to amend. I would like the opportunity to address the tolling, the application of the California law, but if the Court determines that that's better done on a motion to dismiss, that's what we will do.

THE COURT: Okay. All right, so I'm going to give my ruling orally on this. Bear with me.

All right, so this is an action brought on behalf of the plaintiffs, named plaintiffs and other employees of the defendant asserting Fair Labor Standards Act claim, and now before the Court is plaintiffs and other - the existing complaint has other state law claims, does it not?

MS. COLE-CHU: That's correct, Your Honor.

THE COURT: Yes, and other state law claims. And now there's a motion before the Court to file, to

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2 amend by filing a third amended complaint. As we've
3 discussed, the defendants object to the filing of the
4 third amended complaint because they contend that one of
5 the claims being added there, a claim under the
6 California Private Attorneys General Act, under the
7 California Labor Code 2698, et seq. is time-barred,
8 regardless of who might serve as the class
9 representative for that claim.

10 The case law reflects that while it is possible
11 to decide an issue of statute of limitations on a motion
12 to amend, it is often best reserved to a later stage of
13 the case such as a motion to dismiss or motion for
14 summary judgment, especially when there are issues of
15 equitable tolling that are involved, and it's unclear
16 now whether we even need, whether the plaintiff would go
17 outside the complaint for purposes of making that
18 presentation. And I would cite to the Tatum v.
19 Perlmutter case, 2021 W.L. 165088 (Dist. of Conn. Jan.
20 19, 2021).

21 There's also more generic case law that says
22 that considerations of futility can be left to the
23 Court's discretion on a motion to amend. Grace v.
24 Rosenstock, 228 F.3d at p. 53. It's a Second Circuit
25 case. And this certainly is a case where, given the

possibility that there may be material presented outside of the existing pleading on the issue of equitable tolling, that it's appropriate to defer to a later stage of the case. The Court's granting of the motion to amend will have absolutely no effect on the defendant's ability to make whatever arguments it wishes in the future regarding the statute of limitations. It's going to be free to file a motion to dismiss if it complies with the Court's individual practices. But, of course, it can file an answer and simply assert the defense and save for a later stage such as summary judgment the assertion of the defense.

The other two objections from the defendant are that it's including certain common law claims that the Court has recently dismissed - (pause) - I think it is - case law is certainly not clear on this point. The inclusion of the claim has absolutely, would have absolutely no effect on the progress of the case because there's already been a ruling on them. On the other hand, I don't see any reason why they need to be included.

So despite what I said earlier, I actually am going to deny the motion to amend to the extent it includes common law claims that have already been

1 dismissed. Obviously the defendant's rights to appeal
2 the dismissal of those claims are preserved. And I'll
3 actually give you a quote from a case that suggests that
4 there is no need to replead a claim in order to preserve
5 it for appeal, and that would be In re LIBOR-Based
6 Financial Instruments Antitrust Litigation, 2016 W.L.
7 1558504 at p.11. That's a Southern District of New
8 York, April 15, 2016 case. So those should be excised
9 from the proposed third amended complaint as filed on
10 September 13.

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12 I don't see any need to deny plaintiffs the
13 opportunity to designate new class representatives. It
14 has no substantive effect on the progress of the case,
15 so that's going to be permitted. That is my ruling on
16 the motion for leave to amend originally filed as docket
17 number 278. I'm not going to take reargument, but are
18 there any questions about my ruling from the plaintiff?

19 MS. COLE-CHU: No, Your Honor, except just I
20 suppose housekeeping. We can file the - we'll need to
21 prepare another amended complaint without the --

22 THE COURT: Common law claims.

23 MS. COLE-CHU: -- common law claims.

24 THE

25 COURT: Can you file that by, I don't know,

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Monday, Tuesday? What's a good day, you tell me. MS.

COLE-CHU: Sure. Tuesday.

THE COURT: Tuesday it is. That would be the 20th. Any questions from the defendant?

MS. BLOOM: No, Your Honor.

THE COURT: Okay. Thank you, everyone.

MS. BLOOM: Thank you.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Wood v. Mike Bloomberg 2020, Inc., Docket #20-cv-02489-LTS-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature _____

Carole Ludwig

Carole Ludwig

Date: September 16, 2022